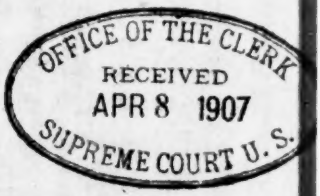
**FILE COPY.**




No. **139.**

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

**WILMINGTON STAR MINING COMPANY,**
*Plaintiff in Error,*
*vs.*
**MINNIE FULTON,**
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## Petition for Rehearing by Plaintiff in Error.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS, CHICAGO.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906.

**No. 139.**

**WILMINGTON STAR MINING COMPANY,**
*Plaintiff in Error,*
*vs.*
**MINNIE FULTON,**
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## Petition for Rehearing by Plaintiff in Error.

MAY IT PLEASE THE COURT:

Upon the retrial of this case ordered by this court the question of the proximate cause of Fulton's death will be again presented to the trial court and jury for consideration. The Supreme Court of Illinois has expressly held in *Odin Coal Co.* v. *Denman*, 185 Ill., at page 418 that

> "it is not sufficient to maintain an action of this character (*i. e.*, under the Mining Act) to establish merely a willful omission of statutory duty. It is necessary the injury complained of shall have resulted from the omission—*that the omission was the proximate cause of the injury.*"

In other words, the same rule as to proximate cause applies in this case, under the authoritative

construction of the act by the Illinois Supreme Court, as applies to other cases at law, viz.,

> "that no negligence or other wrong of any kind whatsoever can furnish the foundation of an action for damages unless it was the proximate cause of the injury suffered by the plaintiff, the maxim of the law being *causa proxima, non remota, spectatur.*" (1 Thompson Comm. on Negligence, Sec. 44),

and defendant will avail itself of this, as of all other defenses, open to it.

In asserting this defense upon the new trial defendant will, we conceive, be seriously handicapped by the opinion of this court bearing upon that subject, insofar as that opinion holds, in effect, that the defendant was guilty of concurrent negligence and that therefore there was no room for the application of the doctrine of proximate cause. We submit that under the evidence in this case, the questions whether defendant was guilty of negligence, concurrent or otherwise, and whether such negligence, even if concurrent, was the proximate cause of the injury, were for the jury to decide, and should have been submitted under instructions so clear and unambiguous as to be incapable of misleading the jury, and we respectfully petition the court to modify its opinion to meet the views hereinafter expressed upon that subject. The subject of concurrent negligence was nowhere raised or discussed upon the trial or in the arguments submitted in the case, but was first introduced in the opinion of the court.

It is necessary to a clear understanding of our present contention to recall the following evidence

introduced upon the trial of this case: 1st, That Fulton was an experienced coal miner, thirty-six years of age, and had worked in the defendant's mines for seventeen years (Rec., 49, 62); 2nd, That he had been working in the mine where he met his death for from two to three months before the accident (Rec., 62) and had laid all the tracks that had been laid in the mine including that in the west entry (Rec., 40, 62) and *had brushed gas out of it* (Rec., 83); 3rd, That there was always gas in the west entry from the time it was opened until the time of the accident (Rec., 40, 64) and that a fan had been installed in this roadway some two months previously for the purpose of overcoming this difficulty (*Ibid*); 4th, That Fulton was with Wilson on the previous afternoon, when the latter had stopped the fan in the mine, after the men quit work (Rec., 65) and on the morning in question had helped to start the fan, a few moments before the accident occurred (Rec., 35, 65, 83) and therefore knew that the gas had been accumulating in the west roadway over night; 5th, That a fellow miner, named Callegaro, had been injured by an explosion of gas in this very roadway within twenty yards of the entrance, during the preceding month to Fulton's knowledge (Rec., 76-7); 6th, That it took about twenty minutes for the fan after it was started to clear the gas out of the west roadway (Rec., 69); 7th, That just before the alleged order was given to Fulton by Wilson he was seen seated upon his car at the foot of the shaft with his arms folded (Rec., 36, 43).

Here was evidence sufficient to justify a finding by the jury that Fulton, an intelligent, rational be-

ing, with knowledge of the danger involved in entering a gaseous roadway with an open light upon his cap, would not, but for Wilson's order, have entered the roadway until it had been made safe through the operation of the fan, *and that he was in fact waiting at the entrance of the roadway with his car for this very thing to take place when the order was given.* Had the jury so found, as it was possible for them to do, they then must further have found that the dangerous condition existing by reason of the accumulation of gas in the west roadway was in process of removal through the means provided by defendant and in the ordinary course of events, so far as they could be reasonably foreseen, the gas would have been dispersed within a few moments so as to be entirely harmless to the occupants of the mine, and that the immediate and proximate cause of the accident was the intervention of an independent, outside force, in no way connected with the gaseous condition in question, nor reasonably to be foreseen by defendant nor chargeable to it under the Act, *i. e.*, an order from the mine manager, Wilson, to proceed at once into the roadway. We do not say that this *must* have been the finding of the jury. It is sufficient for our present contention that it *might* have been; and if this is true, then the question of the proximate cause of Fulton's death should have been submitted to the jury under clear and unambiguous instructions, and this was especially true in view of the importance of the issue and the conflict in the evidence, under the rule hereinafter pointed out. That this was not done appears, as clearly as it can be expressed, by a reading of the following language of the charge:

> "Now by proximate cause is meant efficient cause. *In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death?*"

We submit that the true rule is that laid down in 21 A. & E. Enc. of Law, 2nd Ed., p. 485:

> "A proximate cause in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred,"

and that this rule has been consistently recognized and applied by the federal courts to relieve defendants from liability even though such defendants were themselves guilty of negligence but for which the injury would not have resulted.

In *Railroad Co.* v. *Reeves*, 10 Wall., 176, there was evidence that the defendant had agreed to ship the goods in question by a night train that would have removed them from Chattanooga before the appearance of a destructive freshet, but failed to do so, and the goods were injured by the freshet. The court instructed the jury that if, while the cars were standing at Chattanooga they were submerged by a freshet that no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars *were brought within the influence of the freshet by the act of the defendant*, and, *if the defendant or its agent had not so acted, the loss would not have occurred*, then it was not the act of God and defendant would be liable. Mr. Justice MILLER in rendering the opinion of the court said (p. 190):

> "In contrast with the stringent ruling here stated, and as expressive of our view of the law

on this point, we cite two decisions by courts of the first respectability in this country.

"In *Morrison* v. *Davis & Co.* (20 Pa. St., 171), goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay causd by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur,* applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and families usually exhibit in matters that are interesting to them.

"In *Denny* v. *New York Central Railway Co.* (13 Gray, 481), the defendants *were guilty of a negligent delay of six days* in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison* v. *Davis & Co.*

"Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case."

In the *Reeves* case thus decided by this court, as well as in the Pennsylvania and Massachusetts cases cited in the opinion, the defendant's negligent delay

contributed to the injury to the extent that it could properly be said that but for such negligence the injury would not have happened, just as in the case at bar it could be said that but for the accumulation of gas the death of Fulton would not have happened; yet this court refused to recognize such acts as the proximate causes of the injuries complained of, and for that reason held the defendants not liable. In this case the permitting of the gas to accumulate was no more a concurrent act of negligence than the delaying of the goods was such an act in the cases just cited. In all these instances the defendants had, by their prior negligent inaction, permitted conditions to arise which, under the operation of an independent and unforseen force, over which they had no control and with which they were not chargeable, resulted in injury to the plaintiffs, and the same ruling should apply to each.

This principle is even more strongly brought out in *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep., 400, where it was in evidence that the defendant had negligently shipped a carload of crude petroleum in a car which had no valve regulating the outflow of oil, and it was upon this negligence that the palintiff predicated its action. Plaintiff, the consignee, had the car removed to a sidetrack, and then, with knowledge that the car was leaking, attempted to draw off the oil near plaintiff's mill, and owing to the absence of the valve the oil ran out so rapidly that it flowed into plaintiff's engine room, exploded and destroyed the mill. The court, Judges Woods, Jenkins and Bunn, held that defendant was not liable, since its negligence was not the proximate cause of the injury. It said (page 405):

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

The cases of *R. R. Co.* v. *Kellogg*, 94 U. S., 469, and *Ins. Co.* v. *Boon*, 95 U. S., 130, are then cited, and the court continues:

> "The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the *Boon* case, above referred to, *the incidental cause, or the instrument of a superior and controlling agency*, and was therefore not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion?"

It would be difficult to suggest an illustration more closely in point upon the present inquiry than that here put forth by Judge Jenkins, or to find a case so exactly similar in principle as the one thus decided by the Circuit Court of Appeals.

The case of *Milwaukee Railway Co.* v. *Kellogg*, 94 U. S., 469, referred to in the decision last cited, sets forth the general principles and is a leading case upon this subject. This court, speaking through Mr. Justice STRONG, says (p. 474):

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact at-

tending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, *or was there some new and independent cause intervening between the wrong and the injury?*"

In *Insurance Co.* v. *Boon*, 95 U. S., at 130, this court, again speaking through Mr. Justice STRONG, said:

> "The proximate cause is the efficient cause, *the one that necessarily sets the other causes in operation.* The causes that are merely incidental or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

And again at page 133:

> "The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss." Citing the *Kellogg* case, *supra.*

In the case at bar the gas in the west roadway was harmless to one outside the roadway, at the foot of the shaft, and was, at the time of the accident, being rapidly dissipated under the operation of the fan, and there is not a syllable of testimony or other evidence tending to prove that Fulton would have entered this roadway prior to its clear-

ance from gas had not he been directed so to do by Wilson, while there is evidence, already pointed out, tending to show affirmatively that it was his intention to wait for the roadway to be cleared. Under these circumstances, the gas was, as was said in the *Boon* case, *supra,* merely the instrument of a superior or controlling agency, *i. e.,* the unforeseen and unanticipatable act of Wilson.

In *St. Louis Ry.* v. *Commercial Ins. Co.,* 139 U. S., 223, the defendant was under contract to transport all cotton brought to a certain compress, which agreement it broke by neglecting to furnish transportation. Shortly thereafter a fire occurred which burned up the cotton which the defendant ought to have transported (p. 236). In holding the defendant not liable for the loss, the court say (p. 237):

> "The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the property. It was simply one of a series of antecedent events *without which the loss could not have happened,* for if the cotton had not been there it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, *and in no way arising from or connected with the neglect of the defendant to furnish transportation.* Upon principle and authority that neglect was not the direct and proximate cause of the loss by fire and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers." Citing the *Reeves* and other cases.

In *Lewis* v. *Flint, etc., Ry. Co.,* 54 Mich., 55, the defendant wrongfully carried plaintiff past his station, and in wandering about in search of a pathway plaintiff fell into a cattle guard and was in-

jured. The opinion of the court by Judge Cooley reviews a long list of cases and finds the defendant not liable, as the negligence of defendant was not the proximate cause of the injury, although, obviously, but for such negligent act the injury would not have happened.

It is no answer to our contention that this case should have been submitted to the jury under a proper instruction as to proximate cause to say that the defendant was guilty of concurrent negligence, for even if such were the case, the doctrine of proximate cause still obtains.

In *Union Pacific Railway Co.* v. *Callahan,* 56 Fed., 988, heard in the Circuit Court of Appeals before Judges Sanborn, Shiras and Thayer, Judge SANBORN says, speaking for the court, at page 990:

> "It is also well settled that a master is liable for an injury to a servant which is caused by his own negligence and the concurrent negligence of a fellow-servant (citing cases.) *But in every case the negligence of the master must be the proximate cause of the injury,* and the burden is on the plaintiff to prove such acts of carelessness on his part as constitute the immediate cause of the accident. No act contributes to an injury in the legal acceptance of that term, unless it is a proximate cause of that injury—unless it is near to it in order of causation. *Jacobus* v. *Railway Co.,* 20 Minn., 125."

To the same effect is *Little Rock, etc., R. R. Co.* v. *Barry,* 84 Fed. R., 944, before Judges Sanborn, Thayer and Phillips in the Circuit Court of Appeals, where it was held that even if it were negligence on the part of the defendant not to notify plaintiff, who was the engineer of an extra passenger train, of the position of a freight train with which his train

had collided, or not to notify the freight train employes of the approach of the extra passenger train, still the proximate cause of the injury was the negligence of plaintiff's co-employes in charge of the freight train, and no recovery could be had of the defendant. Judge Thayer's dissent, so far as it relates to this subject, was merely to the point that the question of proximate cause was one for the jury, which is our contention in the present instance.

We submit, furthermore, that Wilson's order and the gaseous condition of the west roadway were not acts of concurrent negligence within the doctrine of the *Hickey* case, 166 U. S., 521, cited by this court in its opinion, in which the act of the street car in crossing the railroad tracks and the act of the Railroad Company's gatekeeper in lowering the gates originated and were carried into execution contemporaneously, and practically constituted one act, as this court held. In the case at bar the accumulation of gas was not an act of the defendant's at all, but was a condition which the defendant had permitted to arise and which had been entirely completed some time prior to the order from Wilson, just as the failure of the railroad companies in the *Reeves, Morrison, Denny,* and *Commercial Ins. Co.* cases, *supra,* to diligently transport the freight created conditions prior to the flood and fire upon which the latter operated to cause the loss. We again refer the court to the facts in the *Goodlander Mill Co.* case, 63 Fed. R., 400, *supra,* and to the illustration of the powder magazine there used, as illustrations of the negligence, if any, of which this defendant was guilty. In any event it

was for the jury to decide, under proper instructions, just what causal relation the accumulation of gas bore to the injury, in view of the positive evidence that this gaseous condition was being rapidly eliminated, and in itself was harmless, so far as Fulton was concerned, up to the time of Wilson's order. This order, by the way, was one for which no recovery could be had not only because not counted upon in the declaration, but also because not forbidden by the Mining Act, and therefore not available as the basis of a statutory action of any character.

If we are correct in our contention that this question of proximate cause was one for submission to the jury, then the law is clear that the court's contradictory and misleading instruction constituted prejudicial error, in view of the conceded conflict of testimony in this case.

> "It is a familiar rule in this court that where there is contrariety of evidence, and where the case has been fairly presented to the jury, on proper instructions, the verdict will not be disturbed unless it is manifestly against the weight of the evidence, or where it appears clearly to have been the result of passion and prejudice; but in that class of cases sounding purely in damages, where the evidence is conflicting, and presents a difficult issue even to persons accustomed to investigate legal matters, the jury ought to be most accurately instructed. We know, from common observation, how apt they are, in cases where the recital of the facts tend to touch their feelings, to seek for a reason that would justify them in finding a verdict in accordance with their sympathies. An improper instruction may often afford the desired pretext, and in all such cases no instruction which is calculated to mislead the

jury into giving a verdict not warranted by law should be allowed to go to them."

*C., B. & Q. R. R. Co.* v. *Van Patten,* 64 Ill., 513.

In *T. W. & W. Ry. Co.* v. *Moore,* 77 Ill., 217, the court say at page 222:

> "If this was a case in its facts where the evidence largely preponderated in favor of appellee we might decline to reverse on the ground that the instruction, although erroneous, did not mislead the jury, but the evidence of the parties is so evenly balanced that justice and the rights of the parties demand that the law should be given accurately to the jury."

In that case, as the court points out at page 219, there was a clear conflict of testimony upon a vital question in the case, viz., as to the sufficiency and safety of the boiler at the time it exploded.

In *Volk* v. *Roche,* 70 Ill., at pages 298-299, it is said:

> "The evidence was conflicting and appellants insist that the instructions were erroneous and misled the jury. Where there is a conflict of evidence or where it leaves it doubtful which way the jury should find, it is important that the instructions should be *not only accurate but clear and perspicuous.*"

The same language is repeated in *Cushman* v. *Cogswell,* 86 Ill., at p. 66.

> "When, however, the evidence is so evenly balanced that the jury might be justified in finding either way, it is highly important that their deliberations should not be influenced by any improper instruction."

*Shaw* v. *The People,* 81 Ill., 151.

We have been served with a petition for rehearing on behalf of defendant in error in this case, and find no rule of the court relating to a reply to such petition by plaintiff in error. The subject treated by defendant in error has been already fully covered in the opinion of the court, which dealt with the authorities cited by defendant in error in her original brief, except, perhaps, as to one point not there mentioned, viz., that defendant's motion to strike out the sixth count of the declaration (Rec., 61) upon the ground that the alleged defect in the mining machinery, of which evidence had been given, was not such a defect as was contemplated by the statute, and defendant's requested instruction that no recovery could be had under this count (Rec., 103) raised questions of law, purely, as to the proper construction of the Mining Act, which the trial court improperly decided against defendant, to its prejudice before the jury. If the rule of this court is not to consider a reply upon a motion for rehearing, the foregoing suggestion can, of course, be disregarded.

Respectfully submitted.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
*Attorneys for Plaintiff in Error.*